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No.

In The
Supreme Court of the United States

STATE OF SOUTH DAKOTA,

Petitioner,

v.

NICHOLAS CUMMINGS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of South Dakota

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the South Dakota Supreme Court contravened this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001), when it held that a Deputy Sheriff who observes a tribal member committing a crime off-reservation may not, as a matter of federal law, pursue the tribal member onto his reservation, detain him there, and take a statement from him there.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of South Dakota.

OPINIONS BELOW

The opinion of the South Dakota Supreme Court is reported at 2004 S.D. 56, 679 N.W.2d 484 and is reprinted at App. 1.

The Findings of Fact and Conclusions of Law and the Order of the Magistrate Court of the Seventh Judicial Circuit were dated July 10, 2003, and filed July 16, 2003. Neither is reported. The documents are reprinted at App. 16 and 23 respectively.

JURISDICTIONAL STATEMENT

The decision of the South Dakota Supreme Court was rendered on April 21, 2004. This Court has jurisdiction to review the judgment of a state supreme court pursuant to 28 U.S.C. 1257(a).

FEDERAL CONSTITUTIONAL PROVISION AND STATE STATUTORY PROVISION INVOLVED

Article I of the United States Constitution states in pertinent part as follows:

> Section 8. The Congress shall have power . . . [t]o regulate commerce . . . with the Indian tribes.

SDCL 32-33-18 states in pertinent part as follows:

Any driver of a motor vehicle who intentionally fails or refuses to bring a vehicle to a stop, or who otherwise flees or attempts to elude a pursuing law enforcement vehicle, when given visual or audible signal to bring the vehicle to a stop, is guilty of eluding. The signal given by the law enforcement officer may be by . . . emergency light, or siren.

STATEMENT OF THE CASE

1. Respondent Nicholas Cummings is a member of the Oglala Sioux Tribe who resides on his reservation, known as the Pine Ridge Reservation, in Shannon County, South Dakota. App. 1-2. All of Shannon County is included in the reservation. *See* App. 2, 18. By contrast, none of Fall River County, which adjoins Shannon County and the reservation, lies within the reservation.

On March 4, 2003, a Fall River County Deputy Sheriff observed Respondent traveling 71 miles per hour in a 65-mile-an-hour zone on U.S. Highway 18, off-reservation, in Fall River County. App. 2. The deputy began to follow respondent who then drove his vehicle across the yellow line. The deputy activated his lights and Respondent increased his speed to 90 miles per hour, still outside the reservation in Fall River County. *Id.*

Respondent led the chase into Shannon County and the reservation, where he began to slow down. *Id.* Respondent stopped about one mile within the reservation. *Id.* The deputy drew his duty weapon as Respondent began to emerge from his car; he then placed Respondent on his

knees to enable him to handcuff Respondent. *Id.* Respondent identified himself as Nicholas Cummings, and the deputy thereupon removed Respondent's handcuffs. App. 2. Respondent Cummings, in fact, had previously served himself as a Shannon County deputy sheriff. App. 32. *See also* App. 41.

The deputy's audio recorder captured a field interview between the deputy and the Respondent in which the Respondent admitted to drinking four beers, the last within 30 minutes. App. 39. This field interview was suppressed by the courts below. App. 11, 22. Respondent in the interview was told that he "should have stopped." App. 40. The Respondent replied "Well, would you have?. . . . If you had four beers?" App. 40-41. Respondent also told the officer that he did not "see your [police] lights until I got by the Casino." App. 42. Respondent refused to perform the DUI tests saying "I'm not going to make it. I mean I already know. . . . I done what you're doing for ten years." App. 41.

At the hearing before the magistrate court, the deputy testified that the tribal authorities had been advised through the dispatcher that the deputy was entering into the reservation. App. 2. The deputy also acknowledged that he did not have a warrant to enter the reservation from the tribal authorities nor did he request permission from tribal authorities to do so. *Id.* The Respondent was charged in state court with speeding and eluding. App. 16.

2. The charge was scheduled to be heard before the magistrate court. The Respondent moved the court to suppress statements taken during the field interview. App. 3. The Respondent argued that, based on a prior state court case, *State v. Spotted Horse*, 462 N.W.2d 463 (S.D.

1990), *cert. denied*, 500 U.S. 928 (1991), state officers lacked authority to gather evidence against a tribal member with regard to an off-reservation offense after the tribal member enters onto the reservation. App. 34-35.

In opposing the motion, the state prosecutor relied on *Nevada v. Hicks*, 533 U.S. 353 (2001). App. 35-37. The prosecutor argued that *Hicks* had found that the State could "go onto the reservation and make an arrest" of a tribal member for an off-reservation crime. App. 37. Based on *Hicks*, the prosecutor argued, the State does have the jurisdiction in question and that the contrary state authority should be "should be disregarded." App. 37.

The magistrate court found that the evidence should be suppressed and adopted verbatim the "Defendant's Proposed Findings of Fact and Conclusions of Law." AR 16-22. The magistrate thus held that because *State v. Spotted Horse* had found that the "arrest and detention" of Respondent within a reservation was "illegal," that the gathering of evidence was likewise illegal, and that the evidence had to be suppressed. AR 22. *See also* AR 23. The effect of the suppression of the evidence was that the prosecutor would be unable to use the evidence gathered in the field interview (*see* AR 39-42) in which the Respondent essentially admitted that he did not stop because he had just drunk four beers. App. 40-41. Because the eluding statute under which he was charged, SDCL 32-33-18, applies to a driver who "intentionally fails" to stop his vehicle after being given a visual or audio signal, the evidence was highly relevant to the prosecution. The magistrate's decision made no reference to *Nevada v. Hicks*.

3. The South Dakota Supreme Court granted the State's petition for permission to take a discretionary appeal and affirmed the magistrate court, relying squarely on *State v. Spotted Horse*. App. 11.

The state supreme court first found that, under *Spotted Horse*, the State's attempt to take jurisdiction over reservations under Public Law 280 had been unsuccessful. App. 4-5. (No PL 280 issues are raised before this Court). The court then turned to the broader issue of whether, lacking PL 280 jurisdiction, the state had jurisdiction to enter onto the reservation to arrest a resident tribal member for an off-reservation violation. The court concluded that since "the State had no jurisdiction on the reservation, we held [in *Spotted Horse*] that our fresh pursuit statute 'could not reach onto the reservation,'" that the arrest of the defendant in that case "was illegal" and the evidence seized from him on the reservation had to be suppressed as the fruit of an illegal arrest. App. 5-6.

The court then rejected the applicability of *Hicks* to the present situation. First, the court found that "[b]y its own terms, the holding of *Hicks* does not apply in this case." App. 6. In support of that proposition, the court quoted this Court's rendition of the "issue" in *Hicks* as whether the "'tribal court may assert jurisdiction over civil claims against state officials. . . . '" App. 6 (quoting *Hicks*, 533 U.S. at 355) (emphasis by S.D. court removed). The court below distinguished the statement of this issue from the issue of whether a state officer may pursue a tribal member onto the reservation. *See also* App. 6-7.

Second, the court found that statements it quoted from *Hicks*, 533 U.S. at 362-363, regarding state jurisdiction on the reservation (see App. 8-9) "cannot be deemed

'holdings' or conclusions necessary to the decision in *Hicks*. The statements are dicta." App. 9. Third, the court stated that "it appears that only two Justices joined that portion of Justice Scalia's reasoning" regarding state jurisdiction and that "[s]ix justices disagreed with the reasoning in the portion of Hicks" regarding state jurisdiction on the reservation. App. 9-10.

The court thus concluded that the question of whether a "state officer in fresh pursuit for a crime committed off the reservation has jurisdiction to enter the reservation without trial permission or a [tribal] warrant was not squarely before the Court." App. 10. It followed, to the South Dakota Supreme Court, that its own prior decision in *Spotted Horse* controlled the issue. App. 11.

Justice Zinter, concurring specially, joined the court's *Hicks* analysis insofar as it "points out the legal and factual distinctions" between *Hicks* and present case. App. 12. Justice Zinter, however, "concede[d] that much of the language of Justice Scalia's opinion . . . suggests that . . . *Spotted Horse* was wrongly decided." App. 12. To Justice Zinter this was "hardly surprising" because other states had found that the state had jurisdiction in cases analogous to this case even prior to *Hicks*. App. 13.

Justice Zinter also disagreed with the majority observation that "only two Justices joined Justice Scalia's 'reasoning' in *Hicks*," finding instead that six justices had joined Justice Scalia's reasoning. App. 13. Justice Zinter added that "the State is correct that much of *Hick's* reasoning foreshadows an eventual reversal of the second underpinning of *Spotted Horse*." App. 14.

Justice Zinter nonetheless joined in the majority decision because of the "fundamental distinction between

the core issue" in *Hicks* and the case at issue before him. *Id.* Justice Zinter finally noted that the court's own jurisdictional views have not been a "model of stability" and for this reason also *Spotted Horse* should not be disturbed. App. 14.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Essential Reasoning Articulated in This Court's Decision in *Nevada v. Hicks*.

This case raises the question of whether a state officer who observes a tribal member committing a crime off-reservation has the right to pursue the tribal member onto the reservation, to detain that tribal member on a road on the reservation, and to take a statement from him. The reasoning underlying *Nevada v. Hicks* conclusively established that a state officer has that authority. In reaching the opposite conclusion, the South Dakota Supreme Court has improperly disregarded this Court's teachings.

A. The Reasoning of *Hicks*.

Hicks arose from a state officer's search of a tribal member's home on a reservation for evidence of an off-reservation crime. The decision resolved the specific question of "whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribal member suspected of having violated state law outside the reservation." 533 U.S. at 355.

To answer the question posed to it, *Hicks* "first inquire[d] whether the . . . Tribes . . . as part of their inherent sovereignty . . . can regulate state wardens executing a search warrant for evidence of an off-reservation crime." 533 U.S. at 358. Examination of this question required the Court to consider whether the right claimed by the tribe was "connected to that right of the Indians to make their own laws and be governed by them." *Id.* at 361. In answering this subsidiary question in the negative, the Court answered the question at issue in this case.

This Court in *Hicks* stated that "State sovereignty does not end at a reservation's border." 533 U.S. at 361. The Court further noted that it had "'long ago'" departed from the view that state laws could have no force within a reservation. *Id.* "'Ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the State.'" *Id.* at 361-362. Consequently, the Court explained, it had been held that the process of state courts could run onto the reservation where the state court otherwise had subject matter jurisdiction. *Id.* at 363 (quoting *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28, 31 (1885)).

Hicks explained that this made "perfect sense, since . . . the reservation of state authority to serve process is necessary 'to prevent [such areas] from becoming an asylum for fugitives from justice.'" 533 U.S. at 364 (quoting *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 533 (1885)). The Court further illustrated the point by identifying the "risk" of a contrary holding raised by a 1969 case emanating from the Ninth Circuit; in that case the circuit court had held that the state authorities could not enter the reservation to seize a tribal member suspected of an

off-reservation crime. *Hicks*, 533 U.S. at 364, n.6 (analyzing *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969).

Hicks thus "conclude[d] today, *in accordance with these prior statements*, that tribal authority to regulate state officers in executing process" related to off-reservation crimes, "is not essential to tribal self-government or internal relations . . . " 533 U.S. at 364 (emphasis added). This subsidiary holding was vital to the Court's ultimate holding that "[b]ecause the . . . Tribe lacked legislative authority to . . . regulate the ability of state officials to investigate off-reservation violations of state law," the tribal courts also lacked the adjudicative authority to hear a claim that the officers "violated tribal law in the performance of their duties." *Id.* at 374.

B. The Reasoning Underlying *Hicks* Is Binding on the Lower Courts.

1. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996), this Court stated that "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." The *Hicks* findings with regard to the extent of **state** jurisdiction constituted a "necessary" part of the opinion regarding **tribal** jurisdiction. Indeed, as set forth above, *Hicks* explicitly relied on its "prior statements" regarding the extent of **state** authority on the reservation in determining that **tribal** authority over state officers was not "essential to tribal self-government or internal relations." *Hicks*, 533 U.S. at 364. Therefore, the language was binding on the state courts.

The South Dakota Supreme Court, however, labeled the *Hicks*' discussion of state authority as a simple series of "statements" which could not "be deemed 'holdings' or conclusions necessary to the decision in Hicks." App. 9. As demonstrated in §I(A), *supra*, that label is incorrect. *Hicks*' discussion of state authority on reservation land was not a mere series of "statements," but rather formed a "necessary" part of the reasoning of the Court. The decision of the Court in *Hicks* regarding tribal jurisdiction was inextricably dependent on the Court's "conclusions" and reasoning regarding state jurisdiction.

2. The decision of the court below was also tainted by its finding that "it appears that only two Justices joined" in the part of the majority opinion discussing the extent of state jurisdiction. App. 9. According to the lower court, "[s]ix justices disagreed with the reasoning in the portion of *Hicks* from which these quotes originate." App. 10. This finding was manifestly erroneous.

Justice Scalia wrote the majority opinion, which five other Justices joined in its entirety. The Chief Justice joined without further comment. Justice Souter, joined by Justices Kennedy and Thomas, filed a concurring opinion which stated that "I agree with the Court's analysis as well as its decision. . . . " 533 U.S. at 375 (Souter, J., concurring). Justice Ginsburg also filed a concurring opinion, which stated, inter alia, "I join the Court's opinion." *Id.* at 386. (Ginsburg, J., concurring). Thus, as Justice Zinter correctly noted in his special concurrence below, "six members of the Court joined Justice Scalia's language." App. 14.

C. The Decision Below Is in Conflict With *Hicks*.

In *Hicks*, this Court found that general principals of Indian law legitimized a search by a state officer of the home of a tribal member on the reservation. *Hicks* further found that "State sovereignty does not end at a reservations' border," 533 U.S. at 361, and discredited the Ninth Circuit decision in *Arizona ex rel. Merrill v. Turtle*, which prohibited a sheriff from entering a reservation to seize a tribal member for an off-reservation crime. *Hicks*, 533 U.S. at 364, n.6. *Hicks* found, in a statement particularly pertinent to this case, that "the reservation of state authority to serve process [on the reservation] is necessary to 'prevent [such areas] from becoming an asylum for fugitives from justice.'"

Hicks leaves no doubt that – contrary to the decision of the South Dakota Supreme Court – the state has authority as a matter of federal law to enter a reservation in pursuit of a fleeing perpetrator, detain the perpetrator, and take a statement from him. Only in this way will the South Dakota reservations be prevented "'from becoming . . . asylum[s] for fugitives from justice,'" 533 U.S. at 364, and only in this way will this Court's finding that "State sovereignty does not end at a reservation's border" be honored. 533 U.S. at 361. There is no tenable basis upon which to distinguish a state's authority to execute a search warrant of a tribal member on a reservation and a state's authority to pursue, detain, and take a statement from a tribal member whom an officer observed committing an off-reservation crime.

Indeed, the intrusion in this case is less than that in *Hicks,* which recognized the propriety of a state search of a tribal member's home on a reservation. This Court has often recognized the high constitutional protection afforded to a home. *See, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 610 (1999). In the case now before this Court, the Respondent was detained on a road on a reservation; stops on roads raise far fewer constitutional questions than do searches of homes. *See, e.g.*, *Maryland v. Wilson*, 519 U.S. 408, 411 (1997). Finally, the claim to exclude state jurisdiction on reservations in general is at its nadir on public roads. *See Strate v. A-1 Contractors*, 520 U.S. 438, 455-456 (1997).

II. The Issues Raised Are Important to State Law Enforcement and State Sovereignty

1. Lacking, in its view, a "clear holding by a majority of the Supreme Court," the court below refused to budge from the position it had taken in *Spotted Horse* that the state lacked authority to pursue a fleeing tribal member onto the reservation and detain and question him. App. 6. But as the South Dakota Supreme Court itself acknowledged in *Spotted Horse*, "[w]hen a crime is committed off the reservation and criminals can flee unimpeded onto the reservation, both Indians and non-Indians alike are harmed." 462 N.W.2d at 469. This Court addressed that precise concern in *Hicks*. 533 U.S. at 364 (citing *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. at 533).

The negative effects of allowing reservations to become sanctuaries for tribal members fleeing justice are manifest and manifold. Such a rule erodes the deterrent effect of the law, allows wrongdoers to remain at large and free to commit more crimes, and generates an abiding contempt for the law among non-members and members alike. Moreover, the very act of a driver speeding up to beat a state officer to the reservation border is a hazardous one that will almost inevitably lead to injury or loss of life.

These concerns are especially pronounced in South Dakota, where the state's seven reservations are within reach of many of those who might choose to flee from police. It is now well known in the State that a tribal member committing a traffic offense (or a more serious offense) need merely speed up and beat the state officer to the border to have "sanctuary." South Dakota's interest is emphasized by the already high fatality rate on roads on the state's reservations: Shannon County, where this case arose, experienced seven percent of the state fatalities in a recent three-year period, although the county accounts for only 1.7 percent of the state's population.[1] These problems will not, of course, be limited to South Dakota. The South

[1] *See* United States Census, South Dakota: 2000; Population and Housing Counts, p. 2; South Dakota Department of Transportation, Accident Records Office, 1999 South Dakota Motor Vehicle Traffic Accident Summary, Table 3-8; South Dakota Department of Transportation, Accident Records Office, 2000 South Dakota Motor Vehicle Traffic Accident Summary, Table 3-8; Department of Transportation, Accident Records Office, 2001 South Dakota Motor Vehicle Traffic Accident Summary, Table 3-8.

Dakota Court's decision will prompt similar challenges in other states, along with similar dangers to life and property.

2. The states have a strong interest, generally, in the proper demarcation of their sovereignty *vis a vis* Indian tribes and tribal members. All of the states of the Union, including South Dakota, have long been recognized as having a certain measured jurisdiction on the reservation.[2] *Hicks*, of course, confirmed this. *See Hicks*, 533 U.S. at 361 ("State sovereignty does not end at a reservation's border"). The core reason for this is that reservations are part of the territory of the state within which it is situated. Reservation residents, Indian and non-Indian alike, are entitled to services provided by the state and, indeed, are often provided them at a rate significantly higher than other citizens of the state.[3] Tribal members vote in state and local elections and tribal members serve on local units of government and in the state legislature.

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[2] Several state courts anticipated the *Hicks*' ruling, albeit sometimes with restrictions not adopted in *Hicks* itself. *See City of Cut Bank v. Bird*, 38 P.3d 804, 807-808 (Mont. 2001); *State v. Mathews*, 986 P.2d 323, 337 (Idaho 1999); *State v. Lupe*, 889 P.2d 4, 7 (Ariz. Ct. App. 1995); *Fournier v. Roed*, 161 N.W.2d 458, 461 (N.D. 1968). A leading treatise states, moreover, "Even before Hicks, most courts reviewing" arrests of tribal members arising from hot pursuits starting off-reservation and ending on reservation had "upheld their validity." Clay Smith, ed., *American Indian Law Deskbook*, 3d ed. 133 (2004).

[3] State-generated statistics indicate that the state expended, on education, $6,958 per Average Daily Membership (ADM) in Shannon County in fiscal year 2001 and $4,785 in Todd County, another reservation county. The average county ADM payment for the state, however, was only $518 per student.

The South Dakota Supreme Court below relied upon its erroneous holding that "the State had no jurisdiction on the reservation." App. 5; *Spotted Horse*, 462 N.W.2d at 467 ("South Dakota had no jurisdiction on the reservation."). That holding significantly – and erroneously – diminishes the State of South Dakota's sovereignty on a substantial portion of the land in the state. Intervention by this Court is merited.

CONCLUSION

For the foregoing reasons, the state respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

NICHOLAS CUMMINGS,

Defendant and Appellee.
[2004 SD 56]

South Dakota Supreme Court
Appeal from the Seventh Judicial Circuit,
Fall River County, SD
Hon. Michael J. O'Connor, Magistrate Judge
#22936 – Affirmed

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Argued Feb. 17, 2004; Opinion Filed Apr. 21, 2004

SABERS, Justice.

[¶1] The State filed a petition for permission to take a discretionary appeal on July 31, 2003. The Court granted the petition on August 28, 2003. The State argues that the magistrate court abused its discretion by suppressing all evidence gathered by a state law enforcement officer after going onto the Pine Ridge Indian Reservation in pursuit of a tribal member. We affirm.

FACTS

[¶2] Nicholas Cummings, the Defendant, is a member of the Oglala Sioux Tribe and he resides on the Tribe's Pine

Ridge Reservation. The reservation is in Shannon County. Fall River County adjoins Shannon County. On March 4, 2003, Deputy Sheriff Steven McMillin was traveling west when he observed Cummings traveling east on US Highway 18 in Fall River County. Cummings was traveling 71 miles per hour in a 65 mile per hour zone. The deputy turned his vehicle around and began following Cummings. While still in Fall River County, the deputy observed the vehicle cross the yellow line. The deputy activated his lights and Cummings increased his speed to 90 miles per hour. The deputy gave chase. At the time the chase commenced, the vehicles were approximately two miles from the border of Shannon County and the reservation. The deputy pursued Cummings onto the reservation. Once he crossed onto the reservation, Cummings began to slow down and he stopped approximately one mile within the border.

[¶3] The deputy exited his car, weapon drawn. He placed Defendant on his knees, handcuffed him, and brought him to the front of the patrol car. Once the deputy confirmed Cummings' identification, he removed the handcuffs. The deputy's recorder in his cruiser captured a conversation between the deputy and Defendant wherein Defendant stated that he had been drinking.

[¶4] The deputy did not have a warrant to enter the reservation, and he failed to request permission from tribal authorities to enter the reservation. He did, however, advise authorities, through his dispatcher, that he was in pursuit and would be crossing onto the reservation. The Defendant was charged in state court with speeding and eluding.

[¶5] After hearing arguments and taking testimony on Defendant's motion to suppress, the magistrate held that *State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990) required suppression of all evidence the officer obtained after he entered the reservation. Everything the officer observed before the Defendant went on the reservation was held admissible. The State appeals raising one issue:

> Whether a state officer in fresh pursuit for a traffic violation may pursue a tribal member onto his reservation and gather evidence from the driver when the alleged crimes were committed off the reservation.

We affirm.

STANDARD OF REVIEW

[¶6] We review a trial court's grant or denial of a motion to suppress under the abuse of discretion standard. *State v. Engesser*, 2003 S.D. 47, ¶ 15, 661 N.W.2d 739, 746 (additional citation omitted). The trial court's findings of fact are reviewed under the clearly erroneous standard of review, but the application of a legal standard to those facts is a question of law, which we review de novo. *State v. Hodges*, 2001 S.D. 93, ¶ 8, 631 N.W.2d 206, 209.

[¶7] **Whether a state officer in fresh pursuit for a traffic violation may pursue a tribal member onto his reservation and gather evidence from the driver when the alleged crimes were committed off the reservation.**

[¶8] In *State v. Spotted Horse*, we faced a similar factual scenario. Spotted Horse, an enrolled member of the Standing Rock Sioux Tribe, who resided on the reservation, was

observed driving a vehicle that did not display valid license plate stickers. *Spotted Horse*, 462 N.W.2d at 464. A Mobridge city police officer attempted to stop Spotted Horse while still in Mobridge. He gave chase and after a high speed pursuit, Spotted Horse finally came to a stop in his own driveway at his home on the reservation. After a violent scuffle, Spotted Horse was arrested and taken back to Mobridge. *Id.* On the way back to Mobridge, the officer smelled alcohol. The officer administered a field sobriety test at the police station, which Spotted Horse failed. Spotted Horse agreed to take a blood test and was ultimately charged with driving under the influence, eluding police, resisting arrest, driving without a license and failure to display current registration. *Id.* at 465. He was convicted of driving under the influence and failure to display current registration. *Id.* On appeal, this Court considered whether the police officer was permitted to pursue Spotted Horse onto the reservation and whether the State had jurisdiction to try Spotted Horse.

[¶9] In holding that the State had jurisdiction to try Spotted Horse, we explained South Dakota's jurisdiction over reservations within the state. For the purpose of clarity, we will briefly discuss that history here. Under Public Law 280, passed by the United States Congress in 1953, states which had constitutions or statutes disclaiming jurisdiction over Indian Country were given statutory power to assume and exercise civil and criminal jurisdiction over reservations. *Id.* at 466. South Dakota was such a "disclaimer state." *See* S.D. Const. Art. XXII (providing in part, "we, the people inhabiting the state of South Dakota, do agree and declare that we forever disclaim all right and title to . . . all lands lying within said limits owned or held by any Indian or Indian tribes[.]") In 1961,

the South Dakota Legislature attempted to accept partial jurisdiction over Indian Reservations under Public Law 280. In *Spotted Horse*, we reversed a previous holding that the State could assert such partial jurisdiction. Relying on *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990), we agreed that the State lacked Public Law 280 jurisdiction because that legislation "did not validly retrocede jurisdiction to the state within the terms of PL 280" and because "South Dakota's limited excursion into the area of Indian jurisdiction [was] not responsive to the concerns underlying the passage of PL 280." *Spotted Horse*, 462 N.W.2d at 467 (citing *Rose Bud Sioux Tribe*, 900 F.2d at 1170-71). Furthermore, because Congress amended Public Law 280 in 1968 to require tribal consent prior to any new assertion of jurisdiction, South Dakota was precluded from enforcing its 1961 legislation. This was so because, "the Tribes, particularly in South Dakota, have relied on the protection offered by the tribal consent amendment since 1968." *Id.* Since the State had no jurisdiction on the reservation, we held that our fresh pursuit statute "could not reach onto the reservation" and the arrest of Spotted Horse was illegal. *Id.*

[¶10] Despite the illegality of Spotted Horse's arrest, we held that the trial court had jurisdiction to try the defendant. *Spotted Horse*, 462 N.W.2d at 467.[1] However, we suppressed all of the evidence gathered by the officer while he was on the reservation on the grounds that it was the

[1] The Court in *Spotted Horse* noted that the question whether the state court had jurisdiction over the defendant presented a "very close case." *Spotted Horse*, 462 N.W.2d at 468. The opinion implies that the Court was inclined to reconsider the rule stated therein under different facts. We need not do so in this case as neither party has questioned whether the state court had jurisdiction to try this case.

fruit of an illegal arrest. *Id.* at 469 (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). Despite the suppression of that evidence, we upheld the conviction for failure to display current registration. We reasoned that this was an offense committed off the reservation, and that proof of the offense was independently obtained through the officer's observations before the illegal arrest. *Id.*

[¶11] As previously noted, the trial court relied on our holding in *Spotted Horse* to suppress all of the evidence obtained by the officer after he followed Cummings onto the reservation. State asserts that the trial court erred in relying on *Spotted Horse* and disregarding the United States Supreme Court's holding in *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001). Our review of *Hicks* reveals that its holding does not apply in this case and that the language the State relies upon in support of its argument is insufficient to allow such an incursion on tribal sovereignty, especially without specific direction from the United States Congress or a clear holding by a majority of the Supreme Court.

[¶12] By its own terms, the holding of *Hicks* does not apply in this case. The Supreme Court phrased the issue in that case as:

> [W]hether a *tribal court may assert jurisdiction over civil claims against state officials* who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.

Hicks, 533 U.S. at 355, 121 S.Ct. at 2308, 150 L.Ed.2d at 405 (emphasis supplied). Here, the question is whether a

state officer may pursue a tribal member onto a reservation for a traffic offense without a warrant or tribal permission. The key distinction is that in *Hicks*, the Tribe was attempting to extend its jurisdiction over state officials by subjecting them to claims in tribal court. Here, the State is attempting to extend its jurisdiction into the boundaries of the Tribe's Reservation without consent of the Tribe or a tribal-state compact allowing such jurisdiction. In other words, in *Hicks*, tribal sovereignty was being used as a sword against state officers. Here, tribal sovereignty is being used as a shield to protect the Tribe's sovereignty from incursions by the State. *See* Frankie Sue Del Papa, C. Wayne Howle, *Federal Bar Association Indian Law Conference: Reaffirming Tribal Sovereignty in an Era of Judicial Activism, Distilling the Essence of Nevada v. Hicks: The State's Perspective*, 65.[2] This is significant because historically, the Federal Government has been highly protective of the Tribes' right to be free from harm and interference by states. *Id.*; *See also*, *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

[¶13] Furthermore, while it is not necessary that a case be factually identical in order for it to provide binding precedent, we find that *Hicks* is factually distinguishable. Hicks was a member of the Fallon Paiute-Shoshone Tribes of Nevada. Based on suspicion that Hicks killed a California big horn sheep off the reservation, the state game warden obtained state and tribal court search warrants for Hicks' home. Hicks claimed that sheep heads in his home were damaged and that the search of his home exceeded the bounds of the warrant and brought suit in tribal court

[2] Frankie Sue Del Papa was Nevada's Attorney General and represented the state in *Hicks*.

against Tribe and State officers. He claimed trespass, abuse of process and civil rights violations. His claims were brought under 42 U.S.C. § 1983. On appeal, only his suit against state officials in their individual capacity was at issue. The tribal court held that it had jurisdiction over the claims. State officials and the state filed an action in federal district court seeking a declaratory judgment that the tribal court lacked jurisdiction. The district court granted summary judgment in favor of Hicks and the Ninth Circuit Court of Appeals affirmed. The Supreme Court reversed.

[¶14] State quotes expansively from the lead opinion in *Hicks*, which was written by Justice Scalia. State asserts that by necessity, the Court held that states have inherent jurisdiction on reservations such that state officers are entitled to enter a reservation for enforcement purposes. The State pulls extensively from a portion of Justice Scalia's writing that indicates that "process of state courts may run into an Indian reservation . . . where the subject matter or controversy is otherwise within their cognizance." *Hicks*, 533 U.S. at 363, 121 S.Ct. at 2312, 150 L.Ed.2d at 410. Starting from this proposition, the main writing goes on to state:

> It is also well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed (as was the alleged poaching in this case) off the reservation.
>
> *While it is not entirely clear* from our precedent whether the last mentioned authority entails the corollary right to enter a reservation (including Indian-fee lands) for enforcement purposes, several of our opinions point in that direction.

Hicks, 533 U.S. at 362-63, 121 S.Ct. at 2312, 150 L.Ed.2d at 410 (internal quotation omitted) (emphasis supplied). As the State points out, the Court went on to note:

> Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation.

State contends that these statements by the Court are determinative of the question before this Court. We disagree.

[¶15] First, the Supreme Court was, of course, correct in noting that nothing in the statutory schemes it cited *denies* the State jurisdiction. However, this Court has already determined that our State never effectively asserted jurisdiction over the reservations in South Dakota. Nothing in current federal enactments has overruled the general proposition that the State has no jurisdiction to act on the reservations in South Dakota. It is difficult to maintain the proposition that the State, after having failed to effectively assert jurisdiction when given the opportunity by Congress, now suddenly gains that jurisdiction through no action of the State or the Tribe.

[¶16] Furthermore, the Court's statements in *Hicks* are insufficient to overrule our decision in *Spotted Horse*. The statements noted above cannot be deemed "holdings" or conclusions necessary to the decision in *Hicks*. The statements are dicta.[3] In addition, it appears that only two Justices joined that portion of Justice Scalia's reasoning.

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[3] This is demonstrated by Justice Souter's special writing reaching the same result with different analysis.

Six justices disagreed with the reasoning in the portion of Hicks from which these quotes originate.[4]

[¶17] Finally, the question in *Hicks* was whether the tribal court had jurisdiction over state officers acting in their individual or official capacity on tribal land. *Hicks* should be construed to address that question only, and in fact, several federal courts have done so. *See e.g.*, *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002); *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir. 2002); *United States v. Archambault*, 174 F.Supp.2d 1009 (D.S.D. 2001); *Fidelity and Guaranty Insurance Co. v. Bradley*, 212 F.Supp.2d 163 (W.D.N.C. 2002). The question whether a state officer in fresh pursuit for a crime committed off the reservation has jurisdiction to enter the reservation without tribal permission or a warrant was not squarely before the Court. We decline to usurp the power of the United States Congress to make laws with respect to Native American rights and sovereignty and the authority

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[4] Justice Souter, with whom Justices Kennedy and Thomas joined, stated, "[w]hile I agree with the Court's analysis as well as its conclusion, I would reach that point by a different route." He went on to clarify his reasoning, stating, "[b]ut while the Court gives emphasis to measuring tribal authority here in light of the State's interest in executing its own legal process to enforce state law governing off-reservation conduct [ ] I would go right to *Montana's* rule that a tribe's civil jurisdiction generally stops short of nonmember defendants." *Hicks*, 533 U.S. at 375, 121 S.Ct. at 2318, 150 L.Ed.2d at 418.

Justice O'Connor, with whom Justices Stevens and Breyer joined, flatly rejected Justice Scalia's analysis in this portion of his writing, stating that it was "unmoored from our precedents." *Hicks*, 533 U.S. at 387, 121 S.Ct. at 2324, 150 L.Ed.2d at 425.

Therefore, as indicated, only two justices concurred with that portion of the language and reasoning of the lead opinion upon which the State relies in this case.

of the Supreme Court to interpret those laws by relying on dicta from a factually and legally distinguishable case.

[¶18] The holding of *Spotted Horse* controls our decision. State has presented no authority or argument other than *Hicks* as a basis for overruling *Spotted Horse*. In the absence of a compact between the Tribe and the State, the state officer was without authority to pursue Cummings onto the reservation and gather evidence without a warrant or tribal consent. Therefore, all evidence gathered after the officer entered the reservation was properly suppressed. As in *Spotted Horse*, everything the officer observed before entering the reservation, including the Defendant's alleged speed and attempt to elude the officer, was admissible. Affirmed.

[¶19] GILBERTSON, Chief Justice, and KONENKAMP, and MEIERHENRY, Justices, concur.

[¶20] ZINTER, Justice, concurs specially.

ZINTER, Justice (concurring specially).

[¶21] The State requests that we overrule *State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990) (holding that the State has no jurisdiction to pursue an Indian onto an Indian reservation for criminal offenses committed off the reservation). *Spotted Horse* has two underpinnings. The State does not request that we reconsider the first *Spotted Horse* underpinning, which overruled *State v. Onihan*, 427 N.W.2d 365 (S.D. 1988), and held that the State lacked Public Law 280 "jurisdiction over highways running through the reservations." *Spotted Horse*, 462 N.W.2d at 467. Instead, the State requests that we reconsider *Spotted Horse's* second underpinning, which broadly held that "South Dakota had no jurisdiction on the reservation," and

therefore, hot pursuit could not reach onto the reservation to pursue and arrest a tribal member. *Id.* at 468-69. As a result of this second underpinning, *Spotted Horse* concluded that a state officer's arrest on the reservation is illegal (i.e. a constitutional violation), and any evidence derived from that arrest is inadmissible. The State asks us to reconsider this second underpinning of *Spotted Horse* solely because of language in the United States Supreme Court's recent decision in *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001). Although I join much of the Court's decision declining to apply *Hicks* to *Spotted Horse*, I write specially to explain my view of this case.

[¶22] First, I join the Court's analysis of *Hicks* insofar as it points out the legal and factual distinctions between the civil jurisdiction asserted by the tribal court over non-members in *Hicks* and the State's assertion of criminal jurisdiction over a tribal member in the case at bar. *Supra* ¶¶ 11-14. This fundamental distinction is a significant barrier to *Hicks's* application in this case.

[¶23] However, having said that, I must also concede that much of the language of Justice Scalia's opinion (*see supra* ¶ 14) suggests that the second underpinning of *Spotted Horse* was wrongly decided.[5] This conclusion is

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[5] In addition to the language noted by the majority at ¶ 14, the Supreme Court also noted:

> Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries." "Ordinarily," it is

(Continued on following page)

hardly surprising because, even in the absence of *Hicks*, the other states that have considered this issue conclude that a state has criminal jurisdiction in this situation. *See State ex rel. Old Elk v. District Court*, 552 P.2d 1394, 1396 (Mont. 1976) (rejecting the contention that an arrest was illegal because it was made pursuant to a state arrest warrant and executed by a state officer on an Indian person within the boundaries of an Indian reservation); *State v. Lupe*, 889 P.2d 4, 6 (Ariz. App. Div. 1 1994), *review denied* (Feb. 22, 1995) (concluding that a state properly exercised jurisdiction for an offense committed outside the reservation by an Apache tribal member who was pursued into, and arrested within, the reservation).[6] Therefore, I would not categorically dismiss the State's arguments.

[¶24] I must also part company with the Court's observation that only two Justices joined Justice Scalia's "reasoning" in *Hicks*. *See supra* ¶ 16. I disagree because three Justices explicitly concur in Justice Scalia's and Chief Justice Rehnquist's "analysis as well as its conclusions,"

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now clear, "an Indian reservation is considered part of the territory of the State."

Hicks, 533 U.S. at 361-62 (internal citations omitted).

> [T]ribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations – to "the right to make laws and be ruled by them." The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government.

Id. at 364.

[6] As in these decisions, the record in this case reflects no extradition agreement for the misdemeanor offenses involved. Therefore, the argument of interference with reservation Government discussed in *Benally v. Marcum*, 553 P.2d 1270 (N.M. 1976), is not present here.

Hicks, 533 U.S. at 375 (Souter, J., concurring) (joined by Justice Kennedy and Justice Thomas). Furthermore, Justice Ginsburg concurred in the opinion. *Id.* at 386 (stating "I join the Court's opinion"). Thus, six members of the Court joined Justice Scalia's language, and therefore, the State is correct that much of *Hicks's* reasoning foreshadows an eventual reversal of the second underpinning of *Spotted Horse*.[7]

[¶25] Nevertheless, I join the Court because of the fundamental distinction between *Hicks's* core issue of *tribal* jurisdiction over *non*-members and *Spotted Horse's* core issue of state criminal jurisdiction over *tribal* members. In light of this difference, it is simply too far a stretch to now conclude that *Hicks requires* a reversal of the second underpinning of *Spotted Horse*. Furthermore, it must be recognized that this Court's own view of this jurisdictional subject is not a model of stability. The Court's opinion has changed the last two times the jurisdictional issue has been considered. *See In re Hankins*, 80 S.D. 435, 125 N.W.2d 839 (1964) (no jurisdiction); *Onihan*, 427 N.W.2d 365 (jurisdiction, impliedly overruled *Hankins*); and *Spotted Horse*, 462 N.W.2d 463 (no jurisdiction, overruled *Onihan*). Because this Court has equivocated on the jurisdiction question in the past, it remains prudent for this Court to follow Justice O'Connor's procedural course of following our "best source of 'coherence in the various manifestations of the general law of [Indian

[7] I also part company with the Court's broad conclusion that a compact between a tribe and the State is necessary before a state officer may engage in pursuit of a tribal member onto the reservation for a crime committed off the reservation. *See supra* ¶ 18. I do so because the United States Supreme Court's jurisprudence clearly permits some state jurisdiction in some situations where there is no compact.

jurisdiction][.]'" *Hicks*, 533 U.S. at 388 (quoting *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 121 S.Ct. 1825, 1828-29, 149 L.Ed.2d 889 (Souter, J., concurring)). This course is especially appropriate because the Supreme Court specifically declined to review this Court's last word on the subject in *Spotted Horse*. 462 N.W.2d 463, *cert. denied*, 500 U.S. 928, 111 S.Ct. 2041, 114 L.Ed.2d 125 (1991).

[¶26] Therefore, I conclude that *Hicks* is not sufficiently compelling today to require a reversal of course yet a third time. In the absence of a clearer directive from the Supreme Court or a different request for reconsideration, I believe that stability and predictability in the law require our adherence to *Spotted Horse*.

IN MAGISTRATE COURT
SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA)		
) SS		
COUNTY OF FALL RIVER)		
STATE OF SOUTH DAKOTA,)		File No. CRI 03-91
Plaintiff,)		
vs.)		~~DEFENDANT'S PROPOSED~~ FINDINGS OF FACT AND
NICK CUMMINGS,)		CONCLUSIONS OF LAW
Defendant.)		

THIS MATTER having come before this Honorable Court on the Defendant's Motion to Suppress Evidence; a hearing having been had on this matter on the 4th day of June, 2003; the State appearing personally by and through the Fall River County State's Attorney, Lance Russell; the Defendant appearing personally and by and through his counsel, Rena M. Atchison; the Court having considered the evidence and arguments of counsel; and being fully informed in the premises and having reviewed the testimony of the witnesses makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On the 4th day of April, 2003, the Defendant, Nick Cummings, was charged with a complaint alleging Eluding a Police Officer in violation of SDCL 32-33-18 and Speeding in violation of SDCL 32-25-7;

2. On April 30, 2003, the Defendant made his initial appearance on the above charges and entered a plea of not guilty and waived his right to a preliminary hearing requesting instead a hearing on the issue of jurisdiction and suppression of the evidence;

3. An information was issued on April 4, 2003, as well for the same two charges;

4. A hearing on the Defendant's Motion to Suppress Evidence was held on the 4th day of June, 2003;

5. The testimony at the aforementioned hearing was that on March 4, 2003, Deputy Stephen McMillin, Fall River County Deputy Sheriff met a vehicle, a dark blue 2002 Ford F350, on Highway 18 which appeared to be speeding;

6. Fall River County Reserve Deputy Zac Bader accompanied Deputy McMillin in Deputy McMillin's police vehicle;

7. This occurred at approximately mile marker 71 or 72 along Highway 18 with the 2002 Ford F350 hearing east and the Deputy's vehicle heading west;

8. This occurred at approximately 6:30 p.m. on March 4, 2003;

9. That the Deputy turned around to follow the 2002 Ford F350 east on Highway 18;

10. That the Deputy at about mile marker 72 or 73 observed the 2002 Ford F350 cross the yellow line with the driver's side tires by a small margin of less than one foot;

11. That the Deputy subsequently initiated the lights and sirens on his vehicle;

12. This occurred at about mile marker 73 or 74.

13. The 2002 Ford F350 continued to proceed east on Highway 18 until after crossing the county line leaving Fall River County and entering into Shannon County;

14. That shortly before mile marker 75 on Highway 18, Fall River County ends and Shannon County begins;

15. This is also where the boundary to the Pine Ridge Indian Reservation begins;

16. That within one mile of crossing into the Pine Ridge Indian Reservation, the 2002 Ford F350 stopped alongside Highway 18;

17. That the Deputy proceeded to follow the 2002 Ford F350 onto the Pine Ridge Indian Reservation;

18. That the Deputy did not have permission from the dispatch for the Oglala Sioux Tribe Department of Public Safety or from the Oglala Sioux Tribal Court to enter into the Pine Ridge Indian Reservation;

19. That the Deputy did not have a search warrant or any other documentation allowing him to arrest, detain or otherwise stop the 2002 Ford F350 or the Defendant, Nick Cummings;

20. That the Deputy and the Reserve Deputy Zac Bader ordered the Defendant out of the 2002 Ford F350 at gun point, asking him to kneel and then lay on the ground;

21. That upon the Defendant complying by kneeling only, the Deputy placed handcuffs on the Defendant;

22. That the Defendant identified himself as an enrolled member of the *Oglala Sioux Tribe*;

23. That the Defendant informed the Deputy that he resided within the exterior boundaries of the Pine Ridge Indian Reservation;

24. That the Deputy and the Defendant had an exchange of information a portion of which is embodied in State's Exhibit No. 1;

25. That the Deputy eventually turned the Defendant over to the Oglala Sioux Tribe Department of Public Safety police office which arrived on scene approximately one-half hour after the stop;

26. That the Deputy attempted to have the Defendant perform sobriety tests as well as asked him several pieces of information;

27. That the Defendant Nick Cummings is an enrolled member of the Oglala Sioux Tribe as well as a resident of the Pine Ridge Indian Reservation as stipulated to by the State and demonstrated by Defendant's Exhibit No. A;

28. No compact has been entered into between the Oglala Sioux Tribe and the State of South Dakota or the Fall River County Sheriff's office regarding pursuits onto the Pine Ridge Indian Reservation;

29. Conclusions of law which are placed within these findings of facts erroneously should be considered conclusions of law; the opposite is also true in that if a finding of fact is erroneously placed under the conclusions of law section, it should be considered a finding of fact.

CONCLUSIONS OF LAW

1. Article XXII of the South Dakota Constitution states, "That we, the people inhabiting the state of South Dakota, do agree and declare that we forever disclaim all right and title to . . . all lands lying within said limited owned or held by any Indian or Indian tribes[.]" This Article was passed with the state of South Dakota joining the United States of America as a state.

2. In 1957, South Dakota attempted to take criminal jurisdiction over Indian reservation lands without a constitutional amendment by passing SDCL 1-1-15 which states, "All criminal offenses occurring on Indian lands within such counties shall be dealt with and proceeded against in like manner as if they had occurred on other lands within such respective counties."

3. SDCL 1-1-15 never became operational because criminal jurisdiction was accepted on the condition that the federal government subsidize counties for the cost of the additional assumption of jurisdiction and the federal government never met such conditions. Therefore, the state of South Dakota never accepted criminal jurisdiction within Indian reservations in South Dakota. *In re Petition of High Pine,* 78 S.D. 121, 99 N.W.2d 38 (1959).

4. In 1964, the South Dakota Supreme Court revisited the issue and determined that the State's attempt to assume jurisdiction over highways within the boundaries of Indian reservation was ineffective as well. *Petition of Hankins,* 80 S.D. 435, 125 N.W.2d 839 (1964).

5. This issue was revisited by the South Dakota Supreme Court in 1988 as well in *State v. Onihan,*

417 N.W.2d 365 (S.D. 1988), where the Court determined SDCL 1-1-15 was ineffective in the State's attempt to assume criminal jurisdiction over Indian reservations.

6. The Eighth Circuit Court of Appeals also agreed in 1990 in its decision entitled *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990).

7. The same year, the South Dakota Supreme Court decided a case with facts substantially similar to the case currently before this Court – *State v. Spotted Horse,* 462 N.W.2d 463 (S.D. 1990). The Supreme Court determined that the Fourth Amendment to the United States Constitution required that an arrest or search effectuated by non-tribal law enforcement officer within the exterior boundaries of an Indian reservation was illegal. This was due to the fact that the non-tribal (city) law enforcement officer had no jurisdiction conferred upon him by the federal or tribal government. *Id.* at 469. The remedy for such a search and seizure was the suppression of evidence obtained by the illegal arrest and detention of the Defendant. *Id.* "The exclusionary prohibition extends to indirect as well as direct evidence; physical tangible materials obtained either during or as a direct result of an unlawful invasion, come at by exploitation of the illegal search; and testimony of matters observed during an unlawful invasion to enforce the basic constitutional policies." *Id.*

8. The statements, voluntary or otherwise, made in this case were the direct result of the illegal detention of Mr. Cummings. It makes no difference that *Miranda* warnings were received or whether the dictates of the Fifth Amendment

were followed because it does not remove the primary taint from the illegal stop. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1987). The State has offered no "independent source" from which the statements or evidence could have been obtained separate from the illegal arrest and detention of Mr. Cummings.

9. Therefore, all evidence gathered by Deputy Stephen McMillin or Reserve Deputy Zac Bader after they, as Fall River County authorities, intruded upon the Pine Ridge Indian Reservation is excluded for use at trial by the State of South Dakota.

Dated this 10th day of ~~June~~ July, 2003.

BY THE COURT:

/s/ Michael J. O'Connor
Honorable Michael J. O'Connor

ATTEST:
Carol Foster, Clerk of Court

By: /s/ Carol E. Foster, ~~Deputy~~
(SEAL)

IN MAGISTRATE COURT
SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF FALL RIVER)

STATE OF SOUTH DAKOTA,)
Plaintiff,)
vs.)
NICK CUMMINGS,)
Defendant.)

File No. CRI 03-91

~~DEFENDANT'S PROPOSED~~ ORDER

THIS MATTER having come before this Honorable Court on the Defendant's Motion to Suppress Evidence; a hearing having been had on this matter on the 4th day of June, 2003; the State appearing personally by and through the Fall River County State's Attorney, Lance Russell; the Defendant appearing personally and by and through his counsel, Rena M. Atchison; the Court having considered the evidence and arguments of counsel; and being fully informed in the premises and having reviewed the testimony of the witnesses, it is hereby

ORDERED that the State shall not be permitted to admit testimony, documentation or any form of evidence which depicts the information gathered by law enforcement on March 4, 2003, after crossing into the Pine Ridge Indian Reservation.

Dated this 10th day of ~~June~~ July, 2003.

BY THE COURT:

/s/ Michael J. O'Connor
Honorable Michael J. O'Connor

ATTEST:
Carol Foster, Clerk of Court

By: /s/ Carol E. Foster, ~~Deputy~~
(SEAL)

IN MAGISTRATE COURT
SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF FALL RIVER)

STATE OF SOUTH DAKOTA,	)	
Plaintiff,	)	MOTION HEARING
	)	CRI03-91
V.	)	
NICHOLAS CUMMINGS,	)	
	)	
Defendant.	)	

BEFORE: THE HONORABLE MICHAEL J. O'CONNOR
MAGISTRATE COURT JUDGE
FALL RIVER COUNTY COURTHOUSE
HOT SPRINGS, SOUTH DAKOTA
JUNE 4, 2003

APPEARANCES:

FOR THE STATE: MR. LANCE RUSSELL
State's Attorney
Fall River County
Hot Springs, South Dakota

FOR THE DEFENDANT: MS. RENA ATCHISON
Attorney at Law
PO Box 9460
Rapid City, South Dakota

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* * *

[Excerpt p. 3]

THE COURT: We had a motion hearing with Nicholas Cummings.

MR. RUSSELL: Yes, Your Honor.

THE COURT: The record should reflect this is the time set for a motion hearing in the matter of the State versus Nicholas Cummings who does appear with counsel, Ms. Atchison. The State is present through Mr. Russell.

MR. RUSSELL: State would call Deputy McMillin.

(Witness sworn.)

STEVE MCMILLIN,

called as a witness, being first duly sworn, testified as follows

DIRECT EXAMINATION BY MR. RUSSELL:

Q Steve, would you please state your full name and spell your last name.

A Steve McMillin, M-c-M-i-l-l-i-n.

Q Please, briefly, for the Court, describe – let me ask you this, you're currently a deputy for the Fall River County Sheriff's Department; is that correct?

A Yes, sir.

Q How long have you been employed by the sheriff?

A Since June 5th last year.

Q And before that, where else had you worked?

A Bennett County Sheriff's Office.

* * *

[Excerpt pp. 13-16]

Q And what was his response?

A He said he would answer my question but he wouldn't waive his rights.

Q And did he answer your questions?

A Yes.

Q Were any admissions made?

A Just that he'd drank four beers. That he was scared after he drank the four beers is why he didn't stop.

Q Regarding the eluding charge or speeding, did he make any other admissions at that time?

A I don't remember exactly.

Q But it would be noted in the report or in the transcript; is that correct?

A Correct.

Q Regarding the statements in the beginning, those were unsolicited; is that correct?

A Yes.

MR. RUSSELL: I have nothing further, Your Honor.

THE COURT: Okay. Go ahead and cross-examine.

MS. ATCHISON: Thank you, Your Honor.

CROSS-EXAMINATION BY MS. ATCHISON:

Q Did you have a warrant to enter onto the Pine Ridge Indian Reservation?

A No.

MR. RUSSELL: Your Honor, I object to the question because it is irrelevant.

THE COURT: At this point I'll let you answer that.

A No, I did not.

Q Had you requested permission from any tribal authorities in order to enter the Pine Ridge Indian Reservation?

A I didn't ask for permission. They were advised I was in pursuit.

Q When you say they were advised, could you please specifically discuss who you advised and how?

A I radioed my dispatcher and I advised them to tell the Pine Ridge authorities I was in pursuit. We would be crossing the tribal line.

Q Okay. Now, do you know exactly which mile marker that the Shannon County – I think the Shannon County line and the Pine Ridge Indian Reservation are the exact same line. Can you tell us which mile marker that is.

A Exactly?

Q Yes.

A Not exactly. In the vicinity. It was 74 and a half.

Q So prior to mile marker 75?

A Yes.

Q I wanted to make sure. You had stated that you had some experience with jurisdictional issues with Indian reservations previously. Could you discuss any formal training that you've had in that same area?

A Just that when we are in pursuit, we're not – we cannot arrest if they are a tribal member. We can detain and go into investigations.

Q Okay.

A But we cannot arrest.

Q And where did you receive this training from?

A Through training and on-the-job training and through Bennett County.

Q So primarily through the Bennett County Sheriff's Office?

A Yes.

Q Now, you indicated when you're speaking with Mr. Russell that you initiated your lights at approximately mile marker 72 or 72 and a half?

A Right, in the vicinity. Yep.

Q Okay. Could you discuss the lay of the road through say mile marker 71 through the Pine Ridge Indian Reservation border?

A There is curves from about 71 to just about right about 73 on a hilltop. Then it's a long straight road down the hill to a line.

Q Okay. Now, when you're talking about the lay of the land, where in this lay of the land did you initiate your lights?

A On – as we were coming around one of the corners – one of the corners, excuse me.

Q So prior to hitting the top of that hill?

A Yep. I was right behind him, yes.

Q Now, it's approximately – it was 6:40 at night, close to 7 o'clock at night?

A I believe so.

Q Okay. And this was in March of this year?

A Yes.

Q And you don't believe it was dark yet?

A It wasn't dark. I think it was starting to. The sun was going down.

Q Did you have your headlights on your vehicle?

A I believe so.

Q Had you ever had any prior contact with Mr. Cummings?

A Not in person, no.

Q Did you know that he was an enrolled member of the Oglala Sioux Tribe?

A I assumed he was once he told me who he was.

Q Did you verify that in any way when you were on scene?

A I believe I asked him, but I guess I don't recall if I did or not.

* * *

[Excerpt pp. 20-29]

ROB EVANS,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. RUSSELL:

Q Please state your full name and spell your last name.

A Rob Evans, E-v-a-n-s.

Q And, Bob [sic], you've been a law enforcement officer in Fall River County for how long?

A Going on ten years.

Q Do you know Nick Cummings?

A Not personally, but I know Nick, yeah.

Q How do you know him?

A He used to be a deputy – Shannon County Deputy and he worked here for a few years when I first became an officer here.

Q So he was a law enforcement officer that was paid for by the Shannon County Commission; is that correct?

A I believe so, yes.

Q Okay. And it was for Shannon County that he was a deputy?

A Yes.

Q And was that during whose term as sheriff?

A I believe Nick was a deputy with Leo Bray and part way through Gene Linnahan's (Phonetic) term, I believe.

Q So you know that he was a deputy for Shannon County for at least how many years?

A A couple years I know of anyway.

Q Okay.

MR. RUSSELL: I have nothing further of this witness.

MS. ATCHISON: (Nods head from side to side.)

MR. RUSSELL: Thank you. The State has nothing further.

MS. ATCHISON: Your Honor, I would call Nick Cummings, and I would like to discuss the fact ahead of

time that the sole purpose that I'm calling Nick is to establish his membership in the Oglala Sioux Tribe and his residence. I plan on going into no other areas and I'm not waiving his Fifth Amendment Right to remain silent in those other areas. Thank you, Your Honor.

The Court: Mr. Cummings –

MR. RUSSELL: Your Honor, I guess, I would stipulate, if he's got a tribal card, to the fact he's a member of the Oglala Sioux Tribe.

MS. ATCHISON: And also to his residence on the Pine Ridge Indian Reservation?

MR. RUSSELL: That would be fine.

MS. ATCHISON: Okay. Then I have nothing of this witness.

THE COURT: All right. Stipulation will be admitted.

MR. RUSSELL: Enter that into the record.

MS. ATCHISON: I need to make a copy of it because this is his only copy.

MR. RUSSELL: Okay.

MS. ATCHISON: And I imagine it would be marked as Defendant's Exhibit A.

(Defendant's Exhibit A marked for identification.)

MS. ATCHISON: I would move to admit Defendant's Exhibit A. It's my understanding that should be admitted based upon the stipulation.

MR. RUSSELL: Yes, Your Honor. No objection.

THE COURT: Defendant's A is admitted.

MS. ATCHISON: With that, the defense has no further evidence to present.

THE COURT: Thank you. All right. Okay. The other motion that was before the Court – that was before the Court today, it was a motion on discovery. What's the State's position regarding that motion?

MR. RUSSELL: I have no objection, Your Honor.

THE COURT: That motion will be granted. Do you have any argument you wish to make concerning your motion to suppress, counsel?

MS. ATCHISON: Yes, Your Honor. Basically, pursuant to my reading of the State of South Dakota versus Spotted Horse, any evidence that is gathered after the point that this becomes an illegal arrest and – and – is, basically, suppressed. When I discussed this with the Court previously, we had thought it was a jurisdictional issue. After a thorough reading of Spotted Horse, it becomes clear it's not a jurisdictional issue. It's an issue whether or not – what evidence should be presented at trial against Mr. Cummings. Based upon my reading of Spotted Horse, anything that occurs, basically, past the point of entering the reservation boundary is, basically, illegal. They have no authority to – to traverse across that line. There is no warrant issued. There was no permission given by any authority, and based upon that, this is now an illegal search, seizure, whatever you will.

Mr. Russell may not characterize this as an arrest. However, clearly, my client was taken – you know, when he did exit his vehicle, he was asked to go to his knees and he was handcuffed at gun point. To me, this appears to be

a seizure. I don't know how else it could be interpreted and he is now in custody. He is not free to leave. He is specifically told that he has to wait with Deputy McMillin until tribal authorities get there.

Any of the evidence that is taken by Deputy McMillin from the time that he has crossed the reservation boundaries, anything he has, he's done dealing with Mr. Cummings. Whether he's handing him over to tribal authorities or bringing him back to Fall River, it doesn't matter what he's doing. At that point it becomes an illegal search and seizure.

Therefore, we're requesting anything obtained after that point, after passing mile marker 75 or thereabouts, cannot be used in this prosecution.

THE COURT: Thank you. Do you have a copy of the Spotted Horse case?

MS. ATCHISON: I do, Your Honor, if you would like, it's all marked up, but you can certainly have it. And I did Shepardize it this morning, Your Honor, but I did not print that off.

It was – the only negative authority I could find for that case was an Arizona case that didn't – that didn't follow it.

THE COURT: All right. Thank you.

MR. RUSSELL: Your Honor, the State would rely on the case of Nevada versus Hicks, which is a U.S. Supreme Court case, 533 U.S. 353.

THE COURT: 533 what?

MR. RUSSELL: U.S. 353. I'll give you the State's copy.

THE COURT: All right.

MR. RUSSELL: On page – let's see here. 533, 362, it states, When, however, a state's interests outside the reservations are implicated, the State may regulate the activities even of tribal members on tribal land, as exemplified by our decision in Confederated Tribes. It is also well established in our precedent that states have criminal jurisdiction over reservation Indians for crimes committed, as was the alleged poaching in this case, off the reservation.

The South Dakota Supreme Court made several decisions, Spotted Horse being one of them, that fresh pursuits onto the reservation – this was a Mobridge case. I believe this was the case, Spotted Horse, where a tribal – a city police officer from the City of Mobridge was trying to apprehend a vehicle for – I don't know if it was a Class I or Class II. I think it was a Class II misdemeanor for speeding. The tribal member crossed the bridge into Corson County which is the Standing Rock Sioux Indian Reservation and pursued him for, I believe, 30 miles or so.

MS. ATCHISON: No, I believe, it was seven.

MR. RUSSELL: Okay. Seven. And, anyway, there was a beating I think that had occurred. The police officer got a little rough with the individual. That case was decided by the Supreme Court in 1990. There were subsequent cases decided by the South Dakota Supreme Court that also held that the fresh pursuit doctrine by – by state or local law enforcement people off the reservation would not be valid onto the reservation. However – and that case

may not – in the Shepardization, it may not show up in Nevada versus Hicks because Nevada versus Hicks doesn't essentially cite to this case, and, frankly, I would – I could also give you the Indian Law desk book – the American Indian Law desk book that I have. That case is probably the only those – the South Dakota Supreme Court's interpretations have been distinguishing and – and repudiated by most courts, and in Nevada versus Hicks, the Supreme Court case, that case was a case where – where state authorities got a state search warrant in Nevada off of the reservation for poaching that occurred off the reservation. The state authorities went onto the reservation and arrested the individual at his home, and – and the – the tribe said the state authorities cannot come onto the reservation for off reservation crimes. The U.S. Supreme Court repudiated that understanding and found that the states – the state has interest for off reservation crimes. They can go onto the reservation and make an arrest.

. . . .

It is clear, based on Nevada versus Hicks, that the State has jurisdiction to go on the reservation, and so anything that the South Dakota Supreme Court would have ruled in State versus Spotted Horse would essentially – State versus Spotted Horse, it's a – the State's opinion that is contrary to Nevada versus Hicks, and, therefore, should be disregarded, but, second, it's the – the – the officer in – in part turned – turned Mr. Cummings over to the tribal authorities 20 minutes after he detained him. He told him he was detaining him. He uncuffed him, put him in the car, and as you can tell from the statements on page two, the statements were unsolicited, and, therefore, there was no coercion. The statements were voluntary. They should come

in. There is no jurisdictional problem. I'll turn over the cases I've given you and the statements were voluntary.

Fall River County Sheriff
906 North River Street
Hot Springs, S.D. 57747
Phone: (605) 745-4444
Fax: (605) 745-7591

Interview Between Deputy Steve McMillin
and Nick Cummings
(Speeding)
March 04, 2003

SM: Deputy Steve McMillin
NC: Nick Cummings
ZB: Zac Bader
TO: Tribal Officer

SM: . . . . foot up there for me?

NC: Yea, (inaudible)

SM: . . . . I've got one here too so. . . .

ZB: Here you go.

SM: So, you're not going to do any of the tests?

NC: No Sir.

SM: Don't want to try them at all?

NC: Na, I stopped at Oelrichs and had four beers so. . . .

SM: Do you think those four beers would influence you that much that you wouldn't pass them?

NC: I don't know. I didn't eat today so. . . .

SM: When was the time you last drank then?

NC: Umm, thirty minutes ago.

SM: Now, about how much did you drink did you say?

NC: Four

SM: Four, and you aren't going to do any tests?

NC: No Sir.

SM: Do you know that in the State of South Dakota you are required to take the PBT test?

NC: No, I (inaudible) if I knew that. Do we have a deal with the Tribe?

SM: What's that?

NC: I say, do we have a deal with the Tribe?

SM: Who, as in you guys?

NC: Yea, as in me.

SM: The Tribe's coming yes.

NC: I stopped over here.

SM: So yea, the Tribe's coming.

NC: Um hum (yes)

SM: It should be real quick.

(Dispatch – 1M 1L 10-23)

SM: (10-4, a male 10-12)

(Dispatch – 10-4, did you say you needed Tribal units headed that way?)

SM: (Yea, cause we're on Tribal ground so I need them here as soon as possible.)

(Dispatch – 10-4, they're on their way.)

NC: Just write me for speeding and let me go.

SM: Um, I'm turning you over to the Tribal Cops now. You should have stopped.

NC: Well, would you have?

SM: Yes

NC: If you had four beers?

SM: Yes, I would have, plus I don't drive after I drink.

NC: I know but, it wasn't a very smart deal on my part.

SM: That's why I'm asking you to try the tests. If you don't do the tests then I have to go off of what I've got now.

NC: What, I mean what?

SM: Off of (inaudible)

NC: Alright, I'll try em.

SM: You'll try em? You ain't got contacts in do you?

NC: No, I'm not going to make it. I mean I already know. Christ I done what you're doing for ten years.

SM: Okay

NC: I don't want to refuse em, but I mean there's no since [sic] in doing them. I mean if you want to I'll try.

SM: I mean, it's entirely up to you Nick.

NC: I don't. . . .

SM: Do you think you'll fail them?

NC: Four beers, I ain't going to bullshit you guys.

SM: Well I understand that but I'm, that's why I'm asking, asking you to try the tests, that way. . . .

NC: No, I missed the asking (inaudible), you know what I mean?

SM: I understand that but, just so you understand where I'm coming from here.

NC: Yea. So what this is going to go to the State or what?

SM: Well, you're looking at eluding for sure, um. . . .

NC: I didn't see your lights until I got by the Casino.

SM: I was behind you for two and a half miles before that with lights and siren, and you did speed up there on top of the hill Nick.

. . . .

(2)

No. 04-74

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

NICHOLAS CUMMINGS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

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BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

No. 04-74

SOUTH DAKOTA,
Petitioner,
v.
NICHOLAS CUMMINGS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF IN OPPOSITION

The petition for a writ of certiorari should be denied because it presents no issue worthy of this Court's attention. The South Dakota Supreme Court held that a local law enforcement official in fresh pursuit lacked authority to arrest a tribal member on a reservation for a misdemeanor committed off the reservation. That decision made no new law. To the contrary, the South Dakota Supreme Court merely reaffirmed its 1991 decision in *State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990), reaching the same result in nearly identical circumstances. The State filed a petition for a writ of certiorari in *Spotted Horse*, and this Court denied review, *see South Dakota v. Spotted Horse*, 500 U.S. 928 (1991), just as the Court did in the other tribal fresh

pursuit case that it has considered. *See United States v. Patch*, 114 F.3d 131 (9th Cir.), *cert. denied*, 522 U.S. 983 (1997).

The State seeks to manufacture a different result here by recasting the decision below as "contraven[ing] this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001)." Pet. at i (Question Presented). But the South Dakota Supreme Court discussed *Hicks* at great length in its opinion and carefully noted the critical factual distinctions between *Hicks* and the case at hand. The State alleges no split of authority on the applicability of *Hicks* to the fresh pursuit alleged here; indeed, the decision below is the first published decision to address *Hicks* in this context. Review should be denied for that reason alone.

No extraordinary factors justify review despite the absence of a split on the *Hicks* issue presented by the State. As the dearth of published fresh pursuit opinions suggests, the issue arises infrequently, and it will arise even less frequently in light of the vast and growing body of tribal-state law enforcement agreements that expressly permit state officials to enter reservations in fresh pursuit. Intergovernmental agreements such as these have rendered largely academic the issue of a state officer's authority to make fresh pursuit arrests in a neighboring State, and they are increasingly doing the same for a state officer's authority to make fresh pursuit arrests within a reservation. Nor can the State claim that the decision below will cause some new irreparable harm – as noted, the decision below reaffirmed what has been settled law in South Dakota for nearly 15 years, and even with respect to this particular case the State may yet achieve the outcome it seeks – a conviction at trial – without intervention by this Court. Accordingly, the petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

Respondent Nicholas Cummings is a member of the Oglala Sioux Tribe who resides on the Tribe's Pine Ridge Reservation. The reservation is located entirely within Shannon and Jackson Counties in South Dakota. Fall River County is one of the counties that borders the reservation.

The facts as found by the magistrate court (and left undisturbed by the South Dakota Supreme Court) are as follows. *See generally* Pet. App. 16a-19a (setting forth Magistrate's Findings of Fact). On March 4, 2003, at approximately 6:30 p.m., Deputy Steven McMillin of the Fall River County Sheriff's office was traveling west on a rural, isolated portion of U.S. Highway 18 in Fall River County near the border of the Pine Ridge Reservation when he observed Mr. Cummings traveling east toward the reservation. Deputy McMillin indicated that Mr. Cummings was traveling at 71 miles per hour in a 65 mile per hour zone.

The deputy turned his vehicle around and began following Mr. Cummings. While still in Fall River County, the deputy observed the vehicle cross the yellow line on the hilly and winding road by a "small margin of less than one foot." Pet. App. 17a, ¶ 10. The deputy activated his lights and siren. Mr. Cummings did not pull over and instead continued east on Highway 18. Less than two miles after Deputy McMillin activated his siren, Mr. Cummings crossed out of Fall River County and onto the Pine Ridge Reservation in Shannon County. Deputy McMillin followed Mr. Cummings onto the reservation. He did not seek or have permission from the dispatch for the Oglala Sioux Tribe

Department of Public Safety or any other Oglala official to enter the reservation.

Shortly after entering the reservation, Mr. Cummings stopped his car alongside the highway. Deputy McMillin ordered Mr. Cummings out of the car at gun point and forced him to kneel on the ground. Mr. Cummings complied and was initially placed in handcuffs, although the handcuffs were later removed. Deputy McMillin testified that he then asked Mr. Cummings to step inside the patrol car.

After Mr. Cummings had entered the car, but before any *Miranda* warnings were given, Deputy McMillin conducted a field interview with Mr. Cummings, which was captured on audiotape. In that interview, Mr. Cummings admitted that he had consumed four beers, Pet. App. 39a, and he refused any field sobriety tests. Mr. Cummings steadfastly denied, however, that he had seen the lights on Deputy McMillin's police car before entering the reservation.

Tribal officers then arrived on the scene, and they placed Mr. Cummings under arrest.

B. The Magistrate Court Proceedings

Mr. Cummings was charged in state court with speeding under S.D. Codified Laws 32-25-7 and eluding a police officer under S.D. Codified Laws 32-33-18, both misdemeanors under South Dakota law. Mr. Cummings was not charged under state law for any alcohol-related offense.

Prior to trial, Mr. Cummings moved to suppress the information gathered in the field interview. Following a hearing at which Deputy McMillin was the principal witness, the magistrate court granted the motion to suppress.

The court recognized that its decision was controlled by *State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990), a "case

with facts substantially similar to the case currently before this Court." Pet. App. 21a, ¶ 7. The court noted that, in *Spotted Horse*, the South Dakota Supreme Court had held that "an arrest or search effectuated by [a] non-tribal law enforcement officer within the exterior boundaries of an Indian reservation was illegal," and that the "remedy for such a search and seizure was the suppression of evidence obtained by the illegal arrest and detention of the Defendant." *Id.* (citing *Spotted Horse*, 462 N.W.2d at 469). Accordingly, the magistrate court excluded all evidence gathered by Deputy McMillin after he entered the Pine Ridge Indian Reservation. *See id.* at 22a, ¶ 9.

C. The South Dakota Supreme Court's Decision

The South Dakota Supreme Court granted the State's request for a discretionary, interlocutory appeal to consider whether *Spotted Horse* remained good law, and the court unanimously affirmed the magistrate court's decision.

At the outset, the state Supreme Court noted that nothing in *Spotted Horse* affected the authority of the State to *try* an Indian who had been arrested illegally; indeed, in *Spotted Horse* itself, the South Dakota Supreme Court had relied on the so-called "*Ker-Frisbie* doctrine" and had affirmed the defendant's conviction. 462 N.W.2d at 467-68.[1]

The court then turned to the suppression issue that was the principal subject of the State's appeal. The court noted that the decision in *Spotted Horse* was based primarily on the State's lack of jurisdiction over Indian reservations, and in particular on South Dakota's failure to take advantage of the

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[1] Under the doctrine articulated in *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952), an illegal arrest does not generally affect the jurisdiction of a court to try the defendant.

route established by Congress – through "Public Law 280" – for asserting jurisdiction over such reservations.[2] As the court explained below, "[u]nder Public Law 280, . . . states which had constitutions or statutes disclaiming jurisdiction over Indian Country were given statutory power to assume and exercise civil and criminal jurisdiction over reservations." Pet. App. 4a; *see also Spotted Horse*, 462 N.W.2d at 467. South Dakota was such a "'disclaimer state.'" Pet. App. 4a (citing S.D. Const. art. XXII); *see also Spotted Horse*, 462 N.W.2d at 467. South Dakota, however, refused to assume the full jurisdiction that Congress offered and instead sought to assume only "partial jurisdiction" over certain state highways. Both the U.S. Court of Appeals for the Eighth Circuit and the South Dakota Supreme Court held that the effort to assert partial jurisdiction was invalid. Pet. App. 4a-5a (citing *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990), and *Spotted Horse*, 462 N.W.2d at 467). South Dakota thus lacked jurisdiction over the Indian reservations within its borders, and, "[s]ince the State had no jurisdiction on the reservation, . . . [South Dakota's] fresh

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[2] Public Law 280 – as the Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, 18 U.S.C. § 1162 is commonly called – gave five States (a sixth was added in 1958) civil and criminal jurisdiction over Indian country and allowed other States to assume jurisdiction over Indian country if they so chose. *See generally Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 143 (1984). Several States successfully assumed jurisdiction over all or part of Indian country. *See, e.g.*, *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979). In 1968, Congress amended Public Law 280 to require tribal consent prior to any further assumptions of jurisdiction. *See Three Affiliated Tribes*, 467 U.S. at 143.

pursuit statute 'could not reach onto the reservation' and the arrest of Spotted Horse was illegal." Pet. App. 5a.

The South Dakota Supreme Court then considered whether this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001), required a different result. After a careful and thorough discussion of *Hicks*, *see* Pet. App. 6a-11a, the court concluded that it did not.

The court noted that *Hicks* involved a fundamentally different issue. In *Hicks*, the Tribe had attempted to assert civil jurisdiction over a § 1983 action brought by a tribal member seeking to hold a non-Indian state officer liable for executing a search warrant issued by state court and consented to by the Tribe. Here, in contrast, it was the State that was seeking to "extend its jurisdiction into the boundaries of the Tribe's Reservation without consent of the Tribe or a tribal-state compact allowing such jurisdiction." Pet. App. 7a. In other words, *Hicks* involved tribal sovereignty invoked as "a sword against state officers," whereas here tribal sovereignty was invoked "as a shield to protect the Tribe's sovereignty from incursions by the State." *Id.*

The state Supreme Court noted that the opinions in *Hicks* reinforced the narrow scope of this Court's decision. Thus, the opinion for the Court noted that its holding was "limited to the question of tribal-court jurisdiction over state officers enforcing state law," 533 U.S. at 358 n.2, a point echoed by the concurrences of Justice Souter (joined by Justices Kennedy and Thomas), *see id.* at 376 (Souter, J., concurring), and Justice Ginsburg, *see id.* at 386 (Ginsburg, J. concurring). The South Dakota majority also noted that Justice Souter, although expressly joining the Court's opinion, noted that he would have reached the Court's opinion "by a different route," one that did not involve

consideration of the criminal jurisdictional issues. 533 U.S. at 375 (Souter, J., concurring).

The South Dakota Supreme Court also placed substantial emphasis on the State's failure to assert jurisdiction under Public Law 280. The state court noted that "our State never effectively asserted jurisdiction over the reservations in South Dakota." Pet. App. 9a. The court found it "difficult to maintain the proposition that the State, after having failed to effectively assert jurisdiction when given the opportunity by Congress, now suddenly gains that jurisdiction through no action of the State or the Tribe." *Id.*

Finally, even setting aside that *Hicks* was principally a decision about the jurisdiction of tribal courts, the South Dakota Supreme Court noted that *Hicks* was still not controlling, because the state officers in *Hicks* had obtained consent from the tribal court before entering the reservation, and the officers acted pursuant to a warrant issued by the state court. *Hicks* thus did not resolve whether the same result was required for a state officer who, in fresh pursuit of a misdemeanant, enters a reservation "without tribal permission or a warrant." Pet. App. 10a.

Justice Zinter concurred. Although disagreeing with any suggestion in the majority's opinion that Justice Scalia's opinion in *Hicks* did not speak for a majority of the Justices, he "join[ed] the Court because of the fundamental distinction between *Hicks*'s core issue of *tribal* jurisdiction over *non*-members and *Spotted Horse's* core issue of state criminal jurisdiction over *tribal* members." Pet. App. 14a (Zinter, J., concurring) (emphasis in original).

REASONS FOR DENYING THE PETITION

1. The decision below presents no issue worthy of this Court's attention. The State's principal contention is that the decision below "contravened this Court's decision in *Nevada v. Hicks*, 533 U.S. 353 (2001)." Pet. at i. The State, however, does not even allege a split on the applicability of *Hicks* to fresh pursuit cases; nor could the State do so. The decision of the South Dakota Supreme Court is the first to address the implications of *Hicks* in this context.

Nor is this a situation in which the state court ignored relevant law from this Court. To the contrary, the South Dakota Supreme Court devoted the majority of its opinion to a careful analysis of *Hicks* to determine whether *Hicks* required an overruling of the South Dakota Supreme Court's 1990 decision in *Spotted Horse*. Both the majority and the concurrence identified specific reasons for believing that *Hicks* did not control, and all five Justices agreed that *Hicks* was distinguishable. *See* Pet. App. 6a-11a; *id.* at 14a (Zinter, J., concurring). The State's contention that the South Dakota Supreme Court defied *Hicks* is simply an overblown plea for error correction. As this Court is well aware, such pleas are not typically a basis for granting review.

2. Review of the State's plea for error correction is particularly unwarranted here. Congress provided a mechanism for the State to assert the sort of jurisdiction that the State seeks here when it enacted Public Law 280. No one contests that if the State had validly assumed jurisdiction over Indian country under Public Law 280, the State would have authority to make a fresh pursuit arrest such as that at issue here. South Dakota steadfastly refused, however, to accept jurisdiction on the terms Congress offered. The State's plea now for assistance from this Court is thus mistimed and misplaced.

Moreover, Congress, which has ultimate authority to define the scope of criminal jurisdiction in Indian country, has not seen fit to disturb the result in *Spotted Horse* over the past 14 years. As Public Law 280 and numerous reservation-specific statutes demonstrate,[3] Congress has not hesitated to define jurisdictional boundaries in Indian country when it thought such definition appropriate. Congress's inaction in the face of *Spotted Horse* thus speaks volumes.

Review is also inappropriate because the issue of fresh pursuit onto Indian reservations is becoming ever less important due to the presence of agreements between States and Tribes to address precisely this issue. Over the past decade, scores of Tribes have reached agreement with state and local authorities to address fresh pursuit issues.[4] *See*

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[3] *See, e.g.*, 25 U.S.C. § 713f(c)(6) (granting state criminal jurisdiction over Confederated Tribes of the Grand Ronde Community of Oregon); 25 U.S.C. § 766(b) (granting the State criminal jurisdiction over Paiute Indians of Utah); 25 U.S.C. § 232 (granting the State criminal jurisdiction over all reservations in New York); Act of October 5, 1949, ch. 604, 63 Stat. 705 (granting jurisdiction over the Agua Caliente Reservation to California); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (granting criminal jurisdiction over Sac & Fox Reservation to Iowa); 18 U.S.C. § 3243 (granting criminal jurisdiction over all reservations to Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (granting criminal jurisdiction over Devil's Lake Reservation to North Dakota); 25 U.S.C. § 736(f) (granting Texas full criminal jurisdiction within the boundaries of the federal reservations reestablished by the Act); 25 U.S.C. § 566e (specifying that Oregon has jurisdiction over the restored Klamath Indian Tribe).

[4] *See, e.g.*, Agreement By and Between the Confederated Tribes of the Umatilla Indian Reservation and the State of Oregon Regarding Fresh Pursuit and Extradition, art. I (Oct. 7, 1981); Cross-Deputization Agreement By and Between the Bureau of

generally Hicks, 533 U.S. at 393 (noting the "host of cooperative agreements between tribes and state authorities . . . to provide law enforcement") (O'Connor, J., concurring); Douglas R. Nash & Christopher P. Graham, *'The Importance of Being Honest': Exploring the Need for Tribal Court Approval for Search Warrants Executed In Indian Country After* State v. Mathews, 38 Idaho L. Rev. 581, 593 (2002) (observing that "tribes and states have . . . negotiated numerous cooperative agreements in critical areas of law enforcement"); Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage,* 112 Harv. L. Rev. 922, 927 (1999). The existence of such agreements may well explain the dearth of litigated fresh pursuit cases, *see* Conference of Western Attorneys General, *American Indian Law Deskbook* 105 (2d ed. 1998) (noting that the "issue of fresh pursuit of tribal members onto their reservations has received spare judicial attention"), and it

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Indian Affairs, the Nebraska State Patrol, and the Winnebago Tribe of Nebraska, section 1 (June 1, 2001); Memorandum of Understanding Between and Among United States Bureau of Indian Affairs and Three Affiliated Tribes and City of New Town (North Dakota) (June 18, 1998); A Law Enforcement Agreement Between and Among the Cherokee Nation, the United States of America, the State of Oklahoma and its Political Subdivisions, the Various Boards of County Commissioners, and Various Law Enforcement Agencies, section 4 (Oct. 10, 1994); Deputization Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and the Sheriff of Leelanau County (Michigan), section 3 (Mar. 19, 1997); Law Enforcement Agreement Among the Eastern Shoshone and Northern Arapaho Tribes, the City of Riverton (Wyoming), and the Bureau of Indian Affairs, ¶ 10 (Dec. 18, 2000). *See* www.ncai.org/main/pages/issues/governance/agreements/lea-sd_v_cummings.asp (posting agreements cited here).

highlights the lack of any compelling need for intervention by this Court.

Such agreements are also the most appropriate way to resolve these intergovernmental disputes. Law enforcement agreements reflect the mutual interest that Tribes and States have in ensuring effective law enforcement both inside and outside Indian country, and they do so in a way that respects the sovereign status of each party. As even the state Attorneys General have recognized, "[r]egardless of the precise jurisdictional contours in hot pursuit, extradition, or on-reservation arrest matters, these are areas where mutual assistance agreements between states, tribes, and the United States . . . seem particularly worthwhile, since each government has a common interest in ensuring that their respective criminal justice systems work harmoniously." Conference of Western Attorneys General, *American Indian Law Deskbook* at 105; *see also Spotted Horse*, 462 N.W.2d at 469 (noting the interests of "Indians and non-Indians alike" in reaching agreements to resolve these issues).

Indeed, intergovernmental agreements are precisely the way that States have resolved the jurisdictional issues arising from fresh pursuit arrests across state lines. At common law, an officer from one State lacked authority to enter and make an arrest in another State for a misdemeanor (such as the one at issue here), *see, e.g.*, 2 Wayne R. LaFave, *et al.*, *Criminal Procedure* § 3.5(a), at 22 (2d ed. Supp. 2003) ("At common law, a law enforcement officer did not have authority to arrest in another state, although an exception to this rule existed where the officer was in 'fresh pursuit' of one who had committed a felony") (citation omitted); 5 Am. Jur. 2d, *Arrest* § 72 (1995), and even fresh pursuit arrests for felonies (which were permissible at common law) were a potential source of tension between sovereigns. States thus have

uniformly entered agreements and enacted legislation to allow officers from other States to enter when in fresh pursuit. *See, e.g.*, S.D. Codified Laws 23A-3-9 (granting authority to out-of-state officers to make misdemeanor fresh pursuit arrests in South Dakota); Cal. Penal Code § 852 (adopting Uniform Act on Fresh Pursuit). As noted, Tribes and States are actively working together to reach that same end, and thus intervention by this Court now not only is unnecessary, but would be counterproductive because it would pretermit a process that promises to accommodate all of the law enforcement and sovereignty interests at stake.

3. The State's plea for error correction also should be rejected because the South Dakota Supreme Court correctly concluded that *Hicks* did not control. Indeed, the tribal sovereignty interests implicated here are substantially more important than the sovereignty interests implicated in *Hicks*, in at least three critical respects.

First, as the South Dakota Supreme Court correctly noted, *Hicks* involved the invocation of tribal sovereignty as a sword, whereas here tribal sovereignty is invoked as a shield. The question this Court decided in *Hicks* was whether tribal sovereignty required that a Tribe be empowered to hear a claim against a state officer for civil damages. *See* 533 U.S. at 355. Here, in contrast, the question is whether tribal sovereignty protects a Tribe from unwanted intrusions onto the reservation by state officers. This case thus involves more than a claim for civil damages, and instead involves directly the Tribe's core interests as a sovereign in controlling access to its borders and policing its own territory and members. Such interests go to the heart of tribal sovereignty in a way that providing a forum for civil damages against non-Indians does not.

Second, *Hicks* does not control because *Hicks* involved a search approved by the tribal court and conducted by state officials in concert with tribal officers. *See Hicks*, 533 U.S. at 356 (noting that "a tribal-court warrant" had been "secured" prior to execution of the state-court warrant and that the search was conducted by "three wardens and additional tribal officers"). Here, as noted, the officers neither sought nor received authority to enter the reservation from tribal authorities, and tribal officers arrived on the scene only after the interview that is at issue in this case had occurred. State enforcement action that respects tribal sovereignty by working with tribal officials is manifestly different than state enforcement action that entirely excludes tribal officials. *See, e.g.*, *Hicks*, 533 U.S. at 386 (Souter, J., concurring) (noting that "the uncontested fact that the Tribal Court itself authorized service of the state warrant here bars any serious contention that the execution of that warrant adversely affected the Tribe's political integrity").

Third, in *Hicks* the search was conducted pursuant to a valid warrant, as this Court repeatedly emphasized. Thus, the Court framed its inquiry by asking whether the Tribe "can regulate state wardens *executing a search warrant* for evidence of an off-reservation crime," 533 U.S. at 358 (emphasis added), and the Court justified its result on precedent that "suggest[s] state authority to *issue search warrants* in cases such as the one before us." *Id.* at 363-64 (emphasis added). Here, in contrast, the officer lacked any such valid warrant.

The absence of a warrant is important, particularly where (as here) the underlying crime is a misdemeanor. In the analogous situation of entry into a home for an arrest, for example, the authority of an officer to enter a home pursuant to a warrant is generally unquestioned. For a warrantless

entry, however, even one made in fresh pursuit, the nature of the underlying offense is critical. As a general matter, such a warrantless entry is permissible when in fresh pursuit of a fleeing felon, *see United States v. Santana*, 427 U.S. 38, 42-43 (1976), but *not* when in pursuit of a fleeing misdemeanant, *see Welsh v. Wisconsin*, 466 U.S. 740, 752-53 (1984). The Court explained in *Welsh* "that an important factor to be considered" in balancing the various interests at stake is "the gravity of the underlying offenses for which the arrest is being made." 466 U.S. at 753. A rule (like the common law rule) that prohibits entry onto reservations for misdemeanors such as the offenses at issue here is responsive to the need to weigh the gravity of the underlying offense and reach the required "accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Hicks*, 533 U.S. at 361-62 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980)). *Hicks*, which involved only a search pursuant to a warrant, does not require a different result.

In short, the South Dakota Supreme Court's extensively analyzed the opinions in *Hicks* and determined correctly that *Hicks* did not control. At the very least, in the absence of any split of authority on the applicability of *Hicks* to fresh pursuit cases, the evident distinctions between *Hicks* and the decision below demonstrate that review at this time, as the lower courts are just beginning to wrestle with the full implications of *Hicks*, is not warranted.

4. The smattering of authority cited by the State in a cursory footnote to support the proposition that "[s]everal state courts anticipated the *Hicks* ruling," Pet. at 14 n.2, does not materially aid the State's cause.

Most of the cases cited in the State's footnote pre-date *Hicks* and are, in any event, entirely irrelevant to the issues presented here. *State v. Mathews*, 986 P.2d 323, 337 (Idaho 1999), for example, did not involve fresh pursuit at all, but instead (like the underlying search in *Hicks*) involved a search pursuant to a warrant issued by a state court. *Fournier v. Roed*, 161 N.W.2d 458, 461 (N.D. 1968), a 1968 decision, rejected a habeas challenge contending that an illegal arrest of an Indian by a state officer on a reservation deprived the State of authority to try the Indian. But the South Dakota Supreme Court made clear both in *Spotted Horse* and in the decision below that an unlawful arrest has no effect on the lawfulness of any subsequent trial or conviction, and thus the decision below is entirely consistent with *Fournier*. And although the decision in *State v. Lupe*, 889 P.2d 4 (Ariz. Ct. App. 1994), addresses fresh pursuit issues, it is only a decision of an intermediate appellate court; the Arizona Supreme Court has not decided the issue. *Cf.* S. Ct. Rule 10(b) (focusing on, *inter alia*, decisions of a "state court of last resort").[5]

City of Cut Bank v. Bird, 38 P.3d 804 (Mont. 2001), is the only fresh pursuit case from a state court of last resort cited by the State. But the State does not contend that any tension between *Bird* and the decision below justifies a grant of certiorari. Nor could it. *Bird* relied principally (38 P.3d at

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[5] In *State v. Hook*, 476 N.W.2d 565 (N.D. 1991), the North Dakota Supreme Court held that state officers had jurisdiction to enter the Devils Lake Sioux Indian Reservation, but only because Congress had expressly given the State criminal jurisdiction over that reservation in a 1946 statute. *See id.* at 568-69 (quoting 60 Stat. 229 (1946)); *see also supra* note 3. No such congressional authorization is at issue here, and thus the State correctly does not suggest that *Hook* is relevant.

806-07) on the Ninth Circuit's decision in *United States v. Patch*, 114 F.3d 131 (9th Cir. 1997) – a case not even cited by the State – and *Patch* in turn resolved the issue with a single sentence and a citation to the decision of the state intermediate appellate court in *Lupe*, *see* 114 F.3d at 134. The reasoning in those cases is thus cursory at best.[6] Even absent *Hicks*, therefore, any tension with those cases would not justify this Court's attention. Indeed, this Court denied review in *Patch* despite the tension between *Patch* and *Spotted Horse*, *see* 522 U.S. 983 (1997), and the decision below merely reaffirms *Spotted Horse*. With *Hicks* as an intervening development, the case for review is even weaker, because the relevant question in the lower courts is how *Hicks* applies to fresh pursuit cases, and again this case is the first to address that issue.[7] Any tension between the decision below and pre-*Hicks* cases thus provides no basis for review.

5. The posture of this case – involving an interlocutory pre-trial appeal of a suppression motion – makes this a particularly inappropriate case for review. As the South Dakota Supreme Court made clear, nothing in its decision affects the State's jurisdiction to try Mr. Cummings. Nor is that an empty promise – Spotted Horse, for example, was convicted on charges based on evidence obtained prior to the

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[6] The *Bird* Court's reliance on *Patch* was in any event misplaced. All of the events in *Patch* occurred on the reservation, and the state officer there had authority to patrol the reservation highway where the infraction took place. Whether a law enforcement officer who is lawfully on a reservation highway has authority to leave to make an arrest elsewhere on the reservation was not at issue in *Bird* and is not at issue here.

[7] Although *Bird* technically post-dated *Hicks*, the court in *Bird* made no mention of *Hicks* in its decision, and thus *Bird* itself contributes nothing to resolving the relevant question.

illegal arrest. Here, the principal evidence the South Dakota Supreme Court suppressed was the statement that Mr. Cummings had consumed four beers. But the State brought no alcohol-related charges, and the alcohol-related evidence is entirely irrelevant to the speeding charge. Although the State contends that the evidence is relevant to the eluding charge, *see* Pet. at 4, even there its importance likely pales in comparison with the testimony of Deputy McMillin. The evidence suppressed is thus unlikely to prejudice the State's prosecution of Mr. Cummings. The largely academic nature of the resulting controversy thus weighs heavily against review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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(2)

No. 04-74

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In The Supreme Court of the United States

STATE OF SOUTH DAKOTA,

Petitioner,

v.

NICHOLAS CUMMINGS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of South Dakota

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In *Nevada v. Hicks*, 533 U.S. 353, 362 (2001), this Court stated that it is "well established in our precedent that States have criminal jurisdiction over reservation Indians for crimes committed . . . off the reservation." The Court therefore held that state officers may enter a reservation to serve process on a tribal member who is being investigated for an off-reservation crime. *Id.* at 363-64. In doing so, the Court observed that "the reservation of state authority to serve process [on the reservation] is necessary to prevent [such areas] from becoming an asylum for fugitives from justice." *Id.* at 364 (internal citation and quotation marks omitted).

As the petition demonstrated, the South Dakota Supreme Court failed to adhere to that holding. In ruling that federal Indian law principles prohibit a deputy sheriff who observed a tribal member committing an off-reservation crime from pursuing the tribal member onto his reservation, the South Dakota Supreme Court opted instead to abide by one of its own precedents. This is not a matter of mere error correction, where a lower court arguably misapplied a rule announced by this Court. Rather, the South Dakota Supreme Court expressly chose not to follow *Hicks*, on the ground that this Court did not really mean what it said. Given the importance of this issue – the prospect that South Dakota reservations will become "an asylum for fugitives" – a grant of certiorari is warranted.

Respondent's defense of the South Dakota Supreme Court's decision is entirely unpersuasive. And his assertion that the case is unimportant because of Public Law 280, 67 Stat. 588 (1953), *amended in pertinent part*, 82

Stat. 73, 80 (1968), because of the potential for agreements between tribes and various units of government, and because of the possibility of direct congressional intervention reflects a fundamental misapprehension of the current relationship between states, Indian tribes, and Congress.

1. Respondent's contention (Opp. 13) that the South Dakota Supreme Court correctly ruled that *Hicks* does not control this case is without merit. As an initial matter, Respondent does not even attempt to defend the South Dakota Supreme Court's conclusion (Pet. App. 9) that "only two Justices" joined the portion of the *Hicks* opinion discussing the extent of state jurisdiction. Six Justices joined the opinion of the Court in its entirety. By declining to defend this conclusion of the court below, Respondent virtually admits that the decision was wrong in this important respect.

Respondent instead emphasizes another argument offered by the South Dakota Supreme Court, *viz.*, that *Hicks* is distinguishable from this case because it decided only the question of whether "tribal sovereignty required that a Tribe be empowered to hear a claim against a state officer for civil damages." Opp. 13. Respondent, however, does not even attempt to respond to the petition's discussion of this issue. As the petition explained, *Hicks* concluded that because the tribes "lacked legislative authority to restrict . . . the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duties." 533 U.S. at 374. The conclusion of *Hicks* regarding tribal civil jurisdiction over state officers was thus explicitly dependent on the conclusion regarding the authority of

state officers to enforce laws against tribal members on their reservations. Accordingly, this Court's ruling on the authority of state officers is a holding of the Court fully binding on the lower courts. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) (binding precedent is established not only by the results the Court reaches, "but also [by] those portions of the opinion necessary to that result").

Respondent's other attempts to distinguish *Hicks* are equally unavailing. Respondent relies on the fact that *Hicks* "involved a search approved by the tribal court and conducted by state officers in concert with tribal officers" (Opp. 14), yet *Hicks* explicitly disclaimed any reliance on that tribal warrant (533 U.S. at 359 n.3), calling the warrant "unnecessary." *Id.* at 372. Respondent likewise fails in his attempt to distinguish this case on the grounds that the officer in *Hicks* had obtained a state warrant whereas the deputy sheriff in this case was involved in a hot pursuit situation. Opp. 14-15. To be sure, Fourth Amendment cases on occasion turn on whether a law enforcement officer obtained a search warrant. But Respondent can point to no relevant difference – for Indian law purposes – between a state's authority to execute a search warrant of a tribal member's home on a reservation and a state's authority to pursue, stop, and take a statement from a tribal member whom an officer observed committing an off-reservation crime. Indeed, as the petition noted (Pet. 12) and the Opposition failed to rebut, the intrusion in this case was *less* than that in *Hicks*. It is hornbook criminal procedure law that searches of homes impose greater intrusions on privacy interests than traffic stops.

Hicks plainly controls the outcome of this case. The South Dakota Supreme Court's unwillingness to adhere to *Hicks* should not be countenanced.

2. Respondent attempts to downplay the importance of the question presented by arguing that the most effective means of addressing any problems created by the South Dakota Supreme Court decision is not review by this Court but through Public Law 280, through agreements between the states and the tribes, or through other congressional legislation. Opp. 2, 9-13. The sovereignty, jurisprudential, and public safety ramifications of the decision below are not in any way ameliorated, however, by the mechanisms proposed by Respondent.

Public Law 280 – which gave states the option of assuming civil and criminal jurisdiction in Indian country – is, as a practical matter, entirely irrelevant to any future developments in Indian country jurisdiction. As revised in 1968, Public Law 280 allows jurisdictional concessions by a tribe, including concessions allowing fresh pursuit by state officers onto reservations,[1] *only* by way of a special election of the tribal membership. 25 U.S.C. § 1326. *See also* 25 U.S.C. §§ 1321-22. To our knowledge, no tribe has ceded any jurisdiction under this statute since 1968. Bowing, presumably, to the "actual state of things" in

[1] The Oglala Sioux Tribe of the Pine Ridge Reservation (to which the Respondent fled) would presumably agree. It recently told a federal district court that an agreement to allow the service by the state of its criminal process on the reservation could be made only under 25 U.S.C. § 1326; in such a case, said the Tribe, consent must be expressed "in a special referendum election called by the Secretary of the Interior." Oglala Sioux Tribe's "Amicus Curiae Brief in Opposition to South Dakota's Motion for a Preliminary Injunction" in *State of South Dakota v. Mueller*, Civ. No. 03-3002 (D.S.D. Feb. 18, 2003), at 11.

Indian country (*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832)), even Respondent does not make the audacious argument that a South Dakota tribe, or any tribe, is today willing to yield any jurisdiction through Public Law 280.[2] Not surprisingly, then, this Court found Public Law 280 to be irrelevant to its analysis in *Hicks*, even though the state involved, Nevada, is also not a Public Law 280 jurisdiction. *See* 533 U.S. at 365-66.

Respondent also references the agreements of what he describes as "scores of Tribes" which address "fresh pursuit issues." Opp. 10 & n.4. Given a lack of consent of the tribal membership under Public Law 280, any such agreement would surely be of suspect validity. The agreements identified, in any event, hardly live up to their billing. Only two even mention fresh pursuit by a local or state authority.[3] Given that there are over 330 recognized

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[2] Respondent's assertion (Opp. 9) that South Dakota, prior to 1968, "steadfastly refused" to accept jurisdiction on the terms Congress offered is incomplete and misleading. South Dakota did, in fact, accept civil and criminal jurisdiction over roads through the reservations in 1961. S.D. Codified Laws §§ 1-1-18, 1-1-21. This assumption of partial jurisdiction was initially disapproved by the state courts but later approved by both the South Dakota Supreme Court (*State v. Onihan*, 427 N.W.2d 365 (S.D. 1988)) and the federal district court (*Rosebud Sioux Tribe v. South Dakota*, 709 F. Supp. 1502 (D.S.D. 1989)). The Eighth Circuit, however, found that the State could not take partial jurisdiction in the manner in which it did. *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990). The State Supreme Court, apparently under the mistaken impression that it was virtually compelled to follow the decisions of the Court of Appeals, then reversed its prior decision. *State v. Spotted Horse*, 462 N.W.2d 463 (S.D. 1990). This Court ultimately denied certiorari. *South Dakota v. Spotted Horse*, 500 U.S. 928 (1991); *South Dakota v. Rosebud Sioux Tribe*, 500 U.S. 915 (1991).

[3] *See* Agreement by and between the Confederated Tribes of the Umatilla Indian Reservation and the State of Oregon Regarding Fresh Pursuit and Extradition (October 17, 1981); Law Enforcement Agreement

(Continued on following page)

tribes in the continental United States (68 Fed. Reg. 68180 et seq. (Dec. 5, 2003)) and potentially thousands of governmental units which could make agreements with such tribes, this is a remarkably paltry showing. The larger reservations in South Dakota (Pine Ridge, Rosebud, Cheyenne River, Standing Rock, Lower Brule, and Crow Creek) certainly have expressed no interest in allowing fresh pursuit by the State. Indeed, a tribal leader who supported such an agreement might well be courting political suicide. Respondent makes no claims to the contrary, nor could he.

Finally, Respondent cites a number of statutes which, he claims, indicate that Congress has "not hesitated to define jurisdictional boundaries in Indian country when it thought such definition appropriate." Opp. 10 n.3. Nine statutes are cited. Five were enacted in the 1940s. It is enough to say that Indian law and policy have under gone several permutations since then. The remaining four are restoration acts. They cannot fairly be construed as congressional intervention defining jurisdictional boundaries in a situation parallel to that presented here.

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among the Eastern Shoshone and Northern Arapaho Tribes, the City of Riverton and the Bureau of Indian Affairs (Dec. 18, 2000). The former agreement was clearly part of the retrocession process of the same year and is hardly indicative of what could occur outside of that process. The latter agreement between a tribe and a small city appears to allow fresh pursuit at Section 10, but states in Section 1 that it does not make any "substantive law applicable to a certain person" which would not otherwise be applicable. If it is true, as the opinion below states, that the "State had no jurisdiction on the reservation" (Pet. App. 5), then the Riverton Agreement is meaningless because it *does* attempt to do just that.

Congress may well be the most appropriate forum for a party who wants to overturn long-settled Indian law jurisprudence. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756, 758-760 (1998) (deferring to Congress on the issue of whether to overrule the "settled" doctrine of tribal sovereign immunity). But this Court is the most appropriate forum for a party seeking relief from a lower court decision that failed to abide by this Court's rulings on the extent of state authority on reservations.

In the end, Respondent has failed to demonstrate that the State has any ready means of alleviating the significant negative consequences of the South Dakota Supreme Court's decision. The legal issue presented has been fully considered, the facts are essentially uncontested, and this Court's jurisdiction to hear the matter is not in doubt. The case is well-postured for, and merits, a grant of certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

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